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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VEDANTA SOCIETY OF SOUTHERN CALIFORNIA, Plaintiff and Appellant, v. CALIFORNIA QUARTET, LTD., et al., Defendants and Appellants;	G027714 (Super. Ct. Nos. 791309, 804137 & 804139) O P I N I O N
VEDANTA SOCIETY OF SOUTHERN CALIFORNIA, Plaintiff and Respondent, v. COUNTY OF ORANGE et al., Defendants and Appellants.	G027834

Appeal from a judgment of the Superior Court of Orange County, Robert E. Thomas, Judge. Reversed and remanded with directions.

Law Offices of William D. Ross, William D. Ross, Carol B. Sherman and Barbara J. Higgins for Defendants and Appellants California Quartet, Ltd., Aradi, Ltd., and Aradi, Inc.

Latham & Watkins and Robert K. Break for Defendants and Appellants County of Orange, Orange County Board of Supervisors, Orange County Planning Commission, and Subdivision Committee of County of Orange.

Connor, Blake & Griffin LLP, Edmond M. Connor and David J. Hesseltine for Plaintiff and Respondent.

I

California Quartet and related entities proposed a 705-unit mobilehome development on 222 acres of property they own in Trabuco Canyon. An environmental impact report (EIR) was circulated for the project in 1997, with the county planning commission certifying the final EIR in December 1997. A group of neighbors and environmental organizations led by the Vedanta Society appealed the planning commission's certification to the county board of supervisors, who then deadlocked on a two-two vote when one supervisor abstained. The vice chairman of the board of supervisors interpreted the two-two vote as the equivalent of an affirmance of the planning commission's decision, and later the board voted three-to-one to approve tract maps for a scaled-down project consisting of 299 homes (not 705 mobilehomes).

Then the neighbors and environmental organizations challenged what the county thought was the approval of the EIR in court. The trial judge granted a summary judgment in favor of the neighbors and environmental organizations based on the theory that the two-two vote of the board of supervisors was really "no action" at all, and the result was not the approval of the project, but its rejection. The project was thus effectively delayed at least until a new EIR could be prepared, circulated and voted on for the scaled-down project.

The developer and the county then appealed the trial court's ruling. While the case was on appeal, the trial judge granted some $337,000 in attorney

fees and $67,000 in costs under the private attorney general doctrine now codified in section 1021.5 of the Code of Civil Procedure.[1]

The appeal resulted in a published decision, *Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517 (*Vedanta I*), which affirmed the trial judge's decision, albeit on narrower grounds. The trial judge had ruled that both the California Environmental Quality Act (CEQA) and Government Code section 25005 meant that the tie-vote was the equivalent of taking no action on the EIR, not affirming the planning commission's approval of it. This court based its affirmance solely on CEQA and its regulations. (*Vedanta I, supra,* 84 Cal.App.4th at pp. 525-530.)

We now consider the appeal from the attorney fee and expense order.[2]

II

The actual text of section 1021.5 can be set forth in one paragraph: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with

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[1] All further references in this opinion to section 1021.5 will be to the Code of Civil Procedure.
[2] Because the county and the California Quartet entities filed separate notices of appeal, there are two appellate court docket numbers.

Section 900) of Division 3.6 of Title 1 of the Government Code. [¶] Attorneys' fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in Serrano v. Priest, 20 Cal.3d 25, 49."

The syntax of the statute makes it reasonably clear that whatever discretion is accorded to the trial judge is predicated on the existence of a number of elements, one of which is that the underlying litigation result "in the enforcement of an important right affecting the public interest." The clear import of those words is that if the underlying action hasn't resulted in the enforcement of such a right, the court has no authority *at all* to award fees.

Whether litigation has resulted in the enforcement of an important public right is a question of law because it does not require a factual finding based on conflicting testimony. (See *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 8.)

So, did the underlying litigation regarding the two-two vote result "in the enforcement of an important public right"? Vedanta posits three reasons for a yes answer. All, however, are unpersuasive.

First is that the litigation clarified the law. The problem is that clarification has nothing to do with the "enforcement" of anything, and has only a very attenuated relationship with any *right*. A right is something that can be exercised. Merely knowing what the result of a two-two vote on an EIR is under certain circumstances doesn't do anything to facilitate the exercise of a right. At best it only tells you what might happen under very limited circumstances if you do exercise a right.

Second is that the litigation "enforced" CEQA. Answer: No, it didn't. The county would have complied with CEQA just as much if the trial court or this court had ruled the other way. The enforcement argument is essentially a lawyer's sleight of hand. You take an idea (what happens when there is a tie-vote) that is tangentially related to a broad legal category (what is generally

required in appeals under CEQA) and treat it as if it were a synonym for a general category (the so-called "enforcement" of CEQA) by making an implicit comparison that only makes sense based on the vagueness of certain terms (here, "enforce"). The trial court's and this court's decision on the tie-vote issue merely resolved a dispute over the operation of CEQA in a rare procedural context, not any rights conferred by CEQA.

The final reason proffered by Vedanta is that the underlying litigation furthered a number of important public policies regarding the environment, including the protection of a wildlife corridor between two parts of the county. This reason fails because the link between environmental protection (even in a very general sense) and the previous litigation consists totally of the practical *delay* which the previous litigation caused. The argument confuses the legal result of the underlying litigation (an explication of what happens when there is a two-two vote) with the litigation's collateral effects (delay of and extra cost to a housing project).

Vedanta's argument is based on the unspoken assumption that *anything* that delayed this development is good, and deserves to fit into the category of enforcing an important public right. It is as if courts should assume as a matter of law that the "environmental" side of any litigation is ipso facto in the public interest.

Not so. We need only remind ourselves that CEQA *allows* the development of undeveloped land. The mere delay of a housing project is not itself the enforcement of an important public right. In fact, most of the time, deliberately delaying something is what makes you pay fees (see Code Civ. Proc., § 128.5), not win them from the opposite side.

It is illuminating to ask what the result might have been if the trial court had ruled the other way and we had affirmed that result in *Vedanta I*.

Suppose California Quartet sought fees under section 1021.5 on the theory that by defeating the procedural attack on the EIR, it had facilitated shelter for hundreds and maybe thousands of people, increased the county's housing stock which would have a ripple effect benefiting low income people in other areas, shortened commute times by allowing some workers to live nearer their jobs in Orange County rather than three hours away in Riverside, and given honest and gainful employment to hundreds of workers who in turn would have paid taxes thereby helping alleviate demands on the public treasury. Could it rightly prevail?

No, of course not. *Any* decision on the two-two vote issue would have had some collateral effects, good or bad depending on one's point of view. But those collateral effects were not what the decisions on the two-two vote were about. They were about the effect of the vote, nothing more, nothing less.

IV.

The attorney fee order is reversed with directions to the trial court to enter a new order to the effect that Vedanta shall take nothing by way of its attorney fee request. Our conclusion makes it unnecessary to address Vedanta's cross-appeal, which is targeted at the possibility that the trial court's order may not have properly provided for Vedanta to recover its expenses as well as its fees. It is not entitled to either.

In the interests of justice, all parties will bear their own costs on appeal.

SILLS, P.J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.